No. 97-569

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In the Supreme Court of the United States
October Term, 1997

BURLINGTON INDUSTRIES, INC.,

PETITIONER,

v.

KIMBERLY B. ELLERTH,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICI CURIAE* OF EQUAL RIGHTS ADVOCATES, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES and NATIONAL WOMEN'S LAW CENTER ON BEHALF OF RESPONDENT

Beth H. Parker
Rose Fua
Julia Thakral
Equal Rights Advocates
1663 Mission St.
Suite 550
San Francisco, CA. 94103
(415) 621-0672

Samuel A. Marcosson
Counsel of Record
Louis D. Brandeis School of Law
University of Louisville
Louisville, Ky. 40292
(502) 852-6369

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are organizations strongly committed to achieving equality for women. Each has an abiding interest in sound interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which protects against sexual harassment in the workplace. Descriptions of the individual organizations are set forth in the appendix.[1]

[1] The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored

SUMMARY OF THE ARGUMENT

This case raises the question whether *quid pro quo* sexual harassment occurs where an adverse employment action is threatened but never carried out. In Part I, *amici* urge the Court to hold that such threats constitute *quid quo pro* harassment. Also implicit in the question presented, and made explicit in petitioner's brief (Pet.Br. 15), is the premise that it is significant to the employer's liability whether the label *quid pro quo* is attached to the conduct. This premise is unfounded. We argue in Part II that, whether harassment is characterized as *quid pro quo* or not, an employer ordinarily is vicariously liable when the perpetrator is a supervisor. The distinction petitioner draws between different types of harassment has no basis in Title VII, in the law of agency, or in the realities of the workplace. We conclude in Part III by showing that petitioner's claim of a likely flood of litigation if employers are held liable for supervisory harassment is baseless.

ARGUMENT

The court of appeals correctly held that petitioner may be held liable for sexual harassment committed by one of its supervisors. This conclusion is supported by two distinct points. First, threats made by a supervisor that link tangible job benefits to an employee's compliance with sexual demands constitute *quid pro quo* harassment, even if the threats are not carried out. Second, petitioner's effort to

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this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

draw a sharp distinction between *quid pro quo* and hostile environment harassment for purposes of employer liability is without basis in Title VII or agency law. Regardless of how the harassment is characterized, the employer will ordinarily be liable under agency principles[2] when the perpetrator is vested with supervisory authority.

I. *Quid Pro Quo* Sexual Harassment Occurs Even if the Supervisor Never Carries Out the Threatened Adverse Job Actions

Quid pro quo sexual harassment occurs when a supervisor threatens to link an employment benefit to an employee's agreement to engage in sexual relations. It is not necessary that the supervisor carry out his threat; the threat itself alters the terms and conditions of the target's employment, in violation of Title VII.

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[2] *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (employer liability for sexual harassment based on agency principles). This Court in *Meritor* did not issue a detailed set of rules for application of agency principles. Now, more than a decade later, development of the law has been marked by confusion and routine departures from sound agency principles. *See* David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66, 131 (1995) (arguing that the lower courts "have split on the proper test to apply to . . . harassment by a supervisor," and that their rulings "are difficult to reconcile with the law of agency"). This case presents the opportunity to reaffirm the central role of the law of agency, and to supply the clarity that has been missing since *Meritor*.

The essence of a *quid pro quo* violation is the threat itself, and the link it creates between sex and an employee's work life. Proof of economic injury is not the only way to demonstrate that job benefits are being conditioned on acquiescence to sexual overtures. The plaintiff can demonstrate that: (1) economic injury is threatened; (2) economic injury was avoided by the plaintiff's acquiescence to sexual overtures; *or* (3) non-monetary terms and conditions of employment, such as hours or work assignments, were threatened or actually affected by the *quid pro quo* harassment. *See Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir.) (concluding, "once an employer conditions any term of employment upon the employee's submitting to unwelcome sexual advances, a *quid pro quo* claim is made out"), *cert. denied*, 512 U.S. 1213 (1994); *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994). There is no basis in the statutory language or underlying purposes of Title VII to make employer liability turn on what happens after the threat has been made.

A supervisor's threat may not be carried out due to the employee's acquiescence or for other, unrelated reasons. In either event, the employer is liable for *quid pro quo* sexual harassment. Where an employee has acceded to the coercive sexual demands, the terms and conditions of her employment have been fundamentally altered. Unlike other employees, whose promotions, raises or continued employment are dependent on legitimate factors like their performance or the company's business fortunes, the victim's job status depends, in whole or in part, on her sex.

The opposite conclusion would, in effect, "punish the victims of sexual harassment who surrender to unwelcome sexual encounters." *Karibian*, 14 F.3d at 778. This would produce the perverse outcome of "encourag[ing] harassers to increase their persistence," *id.*, and put them in a better position than if the acquiescence had not occurred. It would distinguish between harassers on a basis that has nothing to do with their own adherence to Title VII, but instead on the success of their transgression.[3]

In a closely related context, extortion and blackmail are no less crimes when the victim submits to the threats and receives the "benefit" promised. *See, e.g., State v. O'Flynn*, 496 A.2d 348 (N.H. 1985) (conditioning job promotions on receipt of campaign contributions is extortion); *Commonwealth v. Tiberi*, 361 A.2d 318 (Pa.Super. 1976) (hinging promotion on employee's payment of money is extortion). As with *quid pro quo* sexual harassment, the threat is the unlawful conduct in these cases. The ultimate success of the enterprise is irrelevant to liability.

Nor is there any greater warrant for excusing sexually coercive threats where the employee does not acquiesce but

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[3] Ordinarily, if the law distinguishes between successful and failed violations of the law, it punishes the attempt less harshly. *See, e.g.*, Ky. Rev. St. § 506.010(4) (punishment for criminal attempt is equivalent to one grade lower than for the completed offense for most felonies). It would thus be ironic to relieve employers of liability because a harasser's sexual demands are met, and punish only "unsuccessful" *quid pro quo* threats, as petitioner's standard would do.

the threats are not carried for other reasons. Of course, if the threat is not carried out, the threatened adverse job consequences are not visited on the plaintiff. What remains, however, is the psychological injury inflicted on the victim. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 47 (1979) ("Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry. When asked whether the experience had any emotional or physical effect, 78 percent of the Working Women United Institute sample answered affirmatively.").[4]

This Court recognized in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), that emotional distress, including but not limited to severe psychological injury, is unquestionably one aspect of the harm that sexual harassment produces. While such injury is not a necessary condition of liability for hostile environment harassment, Title VII has, since 1991, provided a concrete remedy for it. 42 U.S.C. §1981(a)(1) (1988 & Supp. V); *see, e.g., Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997) (affirming award of compensatory damages for emotional distress). In

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[4] *See also* J.L. Vinciguerra, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 Clev. St. L. Rev. 301, 315 (1994) (over 90% of sexually harassed women suffer some debilitating stress reaction, including anxiety, depression, headaches, sleep disorders, gastrointestinal disorders, weight gain or loss, nausea, lowered self-esteem, and sexual dysfunction); L.F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist at 1072 (Oct. 1993).

fact, the damages provision of the Civil Rights Act of 1991 was included in large part because Congress recognized that Title VII had not previously provided adequate compensation for the harm suffered by victims of discrimination, and of sexual harassment in particular. Civil Rights Act of 1991, Pub.L. No. 102-166, § 3(1), 105 Stat. 1071, 1071 (1991) (listing among statute's purposes "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace"); H.R. Rep. No. 40, 102nd Cong., 1st Sess.; pt. 2, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694 (Act was intended "to provide more effective deterrence and adequate compensation for victims of discrimination"); *id.* at 25, 1991 U.S.C.C.A.N. at 718 (discussing problem of inadequate compensation for victims of discrimination, focusing primarily on "the severe consequences of the lack of a damages remedy in Title VII for claimants who suffered severe harassment on the job").

Thus, even where specific threats are not carried out, the threat itself may produce a substantial part of the harm against which Title VII protects. This Court should reaffirm that *quid pro quo* harassment is "sexual misconduct [that] is directly linked to the grant or denial of an economic *quid pro quo*," *Meritor*, 477 U.S. at 65, and make clear that the link comes into being when the supervisor makes the threat.

II. Regardless of the Form Sexual Harassment Takes, An Employer Should Be Held Vicariously Liable When it is Committed By a Supervisor

While *amici* urge this Court to affirm the court of appeals' conclusion that respondent alleged *quid pro quo* sexual

harassment, the test for employer liability for sexual harassment committed by a supervisor should be the same whether it is of the *quid pro quo* or hostile environment variety. The line should be drawn based on who commits the harassment (supervisor or co-worker), rather than by the form it takes (*quid pro quo* or hostile environment). Petitioner's contrary argument lacks a foundation in Title VII, and has no place given the realities of the workplace and Title VII litigation. Finally, a proper application of agency principles demonstrates the fallacy of the line drawn by the petitioner.

A. For Purposes of Employer Liability for Supervisory Sexual Harassment, A Distinction Should Not Be Drawn Between *Quid Pro Quo* and Hostile Environment Sexual Harassment

Title VII forbids discrimination in employment on the basis of an individual's "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), if it affects an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *Oncale v. Sundowner Offshore Services, Inc.*, 66 U.S.L.W. 4172, 4172 (1998). Nothing in the language of Title VII suggests that liability turns on the form sexual harassment takes.

Both *quid pro quo* and hostile environment sexual harassment affect the terms and conditions of employment. *Quid pro quo* does so because, by definition, employment perquisites are conditioned on the performance of sexual services. *See Henson v. Dundee*, 682 F. 2d 897, 908 (11th Cir 1982) ("An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."). The same is true of hostile environment claims, albeit in a

different way. The conduct must be so "severe or pervasive" as "to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67; *see also Harris*, 510 U.S. at 21.

Courts have not made distinctions in determining liability for any type of discrimination other than sexual harassment. The rule petitioner suggests would create a unique, more limited rule for hostile environment sexual harassment. This would contravene Congress' intent to deter all discriminatory conduct and compensate all victims, and send the unfortunate message that hostile environment harassment is somehow a less serious form of discrimination, not due the same employer attention and responsibility as other violations of Title VII. *See Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful."). It would also contradict Congress' finding that "discrimination against women is no less serious than other prohibited forms of discrimination." S.Rep. No. 92-415, 92nd Cong., 1st Sess. 7 (1971).

Deterring discrimination and compensating victims are equally crucial whether the harasser conditions advancement on acquiescence to sexual demands or engages in severe or pervasive harassing conduct that subjects the victim to abusive terms and conditions of employment. As this Court reiterated earlier this Term, Title VII "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,'" *Oncale*, 66 U.S.L.W. at 4172 (*citing Meritor*, 477 U.S. at

64).

Title VII demands that employers be held liable for the discriminatory acts of their supervisory personnel who are delegated the power to make employment decisions. It was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination. *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606 (7th Cir. 1985). In every Title VII context except sexual harassment, courts consistently have applied this rule, rendering the departures from it by some courts in the harassment context all the more striking. For example, in racial and religious discrimination cases under Title VII, courts have held employers liable regardless of whether there was notice or fault. *See, e.g., Young v. Southwestern Sav. & Loan Ass'n.*, 509 F.2d 140, 144 n.7 (5th Cir. 1975) (religious discrimination); *Calcote v. Texas Educ. Found.*, 578 F.2d 95, 98 (5th Cir. 1978) (racial discrimination); *Flowers v. Crouch-Walker Corp.* 552 F.2d 1277, 1282 (7th Cir. 1977) (employer liable for supervisor's racial discrimination, even though it was contrary to company policy and it had not authorized supervisors to discriminate). Ironically, courts have relied on *Meritor* to hold employers liable for discrimination other than harassment when it is committed by supervisors. *See Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751-52 (3d Cir. 1990) (invoking *Meritor* to hold employer liable for gender discrimination by supervisor leading to constructive discharge); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (*Meritor's* use of agency principles applied to wrongful discharge claim).

Moreover, more than two decades of sexual harassment litigation under Title VII have shown that the line between *quid pro quo* and hostile environment harassment -- which petitioner seeks to portray as bright -- hardly exists. Sexual harassment cases do not sort themselves into neat categories. In many situations, the supervisor's conduct contains elements of both *quid pro quo* and hostile environment harassment. In fact, it is extremely rare for a supervisor's actions to be all one type or the other. *E.g., Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) ("The discrimination which gives rise to them is not neatly compartmentalized but . . . the two types of claims may be complementary to one another."); *Henson*, 682 F.2d at 908 n.18 ("On a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases."). As Judge Wood said in the opinion below:

> In the real world, sexual harassment does not sort itself into tidy categories. . . . When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from 'hostile environment' to '*quid pro quo*' harassment.

Pet.App. 177a (Wood, J., concurring and dissenting); *see generally* Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 834 (1991) (distinction between *quid pro quo* and hostile environment harassment is more like a continuum than a

divide).[5]

Because of the factual idiosyncracies of individual cases, it is more manageable for district courts to decide whether the harassment occurred in the first place and who committed it than to parse a supervisor's every act to determine the category into which it falls. For this reason, employer liability should not turn on the often illusory distinction between *quid pro quo* and hostile environment harassment.

This case illustrates this reality. The court of appeals' judges had sharply divided opinions as to whether the conduct Ellerth suffered was *quid pro quo* or hostile work environment sexual harassment. *Compare* Pet.App. 26a (Flaum, J.)(*quid pro quo*), and *id.* at 205a-206a (Wood, J.)(*quid pro quo*), *with id.* at 57a (Posner, J.) ("purely a hostile-environment case"), and *id.* at 102a (Coffey, J.)(hostile work environment), and *id.* at 151a (Easterbrook, J.)(hostile work environment). The bottom line is that Ellerth was discriminated against "because of" her sex, by conduct that altered the conditions of her employment. Regardless of how the conduct is categorized, petitioner

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[5] The EEOC also has recognized that the line between the two forms of harassment is often hard to discern. The EEOC has observed that "'hostile environment' harassment may acquire characteristics of '*quid pro quo*' harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct." EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) 405: 6681 (March 19, 1990).

should be held liable if Ellerth prevails at trial.[6]

As a practical matter, it would severely compromise a plaintiff's ability to prove her claim to hold that employer liability should turn on an artificial distinction between different types of harassment. Before deciding who may be liable, a court first must determine whether sexual harassment occurred. To establish liability, plaintiffs must meet an extremely high burden. As this Court made clear this Term, courts have sought to avoid the transformation of Title VII into a general civility code for the American workplace by imposing a high threshold of proof upon plaintiffs. *Oncale*, 66 U.S.L.W. at 4173. A plaintiff must establish: (1) that the conduct at issue constituted "discrimination . . . because of . .. sex," (2) that the behavior was so objectively offensive as to alter the "conditions" of the victim's employment, and (3) that the behavior be considered in the context in which it occurred and the target experienced it. *Id.* Because of these requirements, only a

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[6] A distinction between forms of sexual harassment should also not be required because pleading rules do not require it. A complaint is not required to state the plaintiff's specific legal theory. *See* Fed.R.Civ.P. 8(a) (complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief"). For sexual harassment claims, a plaintiff need only plead a violation of Title VII based on the harassment; she need not specify whether it was of the *quid pro quo* or hostile environment variety. *See Rohler v. TRW, Inc.*, 576 F.2d 1260, 1264 (7th Cir. 1978). If a plaintiff need not plead the specific form of harassment that took place, it follows that liability should not turn on the distinction.

few of the small number of victims who actually file suit prevail. D.E. Terpstra & D.D. Baker, *Outcomes of Federal Court Decisions on Sexual Harassment*, 35 Acad. of Mgmt. J., Vol. 1, at 185 (1992); U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace* , at viii (1995) (only 6% of those harassed take official action).

Once supervisory harassment is established, litigating separately whether the employer should be held liable imposes an undue burden on plaintiff. A victim should not be required to distinguish between the types of harassment and, in a hostile environment situation, decide to complain and to whom. In light of the difficulty courts have had assigning the labels "*quid pro quo*" and "hostile environment," it is unrealistic to expect a victim to know the precise legal cubbyholes into which her allegations fall.[7]

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[7] Most harassed employees do not even complain. Fifty percent (50%) of women respond to harassment by doing and saying nothing. F. Klein & M. Rowe, *Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms*, Testimony on H.R. 1, before the House of Representatives Committee on Education & Labor, 102nd Cong., 1st Sess. 169, 209 (1991). Only 10% to 15% of women, a review of ten studies revealed, either responded assertively to or reported their harasser. J.E. Gruber & M.D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, Basic & Applied Social Psychology, at 544-545 (1995). The barriers keeping women from complaining about harassment are especially daunting when a supervisor is the source. "Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (e.g., *their supervisor is the harasser*), or by their upbringing." B.A. Gutek, *Responses to Sexual Harassment in* Gender Issues in Contemporary Society, at 197, 205 (1993) (emphasis added). If company policy requires a victim to go to her supervisor first, she may feel she has little recourse and will receive little support. Promises of confidentiality or anonymity are impossible for employers to keep. The accused ultimately will be informed of the accusation and given a chance to present his story, even confront the accuser. Victims understand that the implications for their employment are gravest when a person with power in the organization is involved.

B. A Distinction Between *Quid Pro Quo* and Hostile Environment Sexual Harassment Has No Basis in the Law of Agency

Just as Title VII does not, on paper or in practice, divide sexual harassment into neat categories, neither does agency law. To the contrary, agency law emphasizes an agent's authority in defining the circumstances in which a principal is liable for an agent's actions. Because the use of delegated authority by a supervisor is common to both *quid pro quo* and hostile environment harassment, agency principles hold the employer liable on the same basis for each. In this section, *amici* will first examine the relationship between supervisory authority and sexual harassment in the workplace. We will then discuss the treatment of that relationship by the law of agency.

1. Sexual harassment of women by their supervisors is an exercise of power in the workplace. It represents an extension of a supervisor's control over the terms and

conditions of a subordinate's work:

> [F]rom the employee's point of view, the supervisor's ability to harass her is created precisely by the agency relationship, which affords the supervisor the authority to call her into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger.

Oppenheimer, 81 Cornell L. Rev. at 88.

It is difficult to imagine a scenario in which the supervisor's authority in the workplace will be of no relevance to the employee's perception of the harassment, or in which the supervisor will not in some fashion be capitalizing on his authority when he harasses subordinates. *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997) (because supervisor abused his delegated authority to create hostile work environment, employer is liable despite having no notice), *petition for cert. filed*, No. 97-232 (Aug. 6, 1997); *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997) (supervisor's use of authority to facilitate harassment may be implicit, including acts creating the opportunity), *cert. denied*, 118 S. Ct. 563 (1997). Petitioner is thus simply wrong to suggest, Pet.Br. 22, that a supervisor "has not actually used any authority delegated by the employer" when he makes *quid pro quo*-style threats.

The connection between a supervisor's authority and sexual harassment is underscored by data showing that a

significant portion of harassment occurs between a supervisor and supervisee. One study of Fortune 500 companies found that almost two-thirds of harassment complaints are brought against either a woman's immediate supervisor (36%) or another person with greater power (26%). R. Sandroff, *Sexual Harassment in the Fortune 500*, Working Woman, at 69, 71 (Dec. 1988). Other studies have shown that half of all harassers are the direct supervisors of the target. B.A. GUTEK, SEX AND THE WORKPLACE: IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS (Jossey-Bass, Inc. 1985); B.A. Gutek, C.Y. Nakamura, M. Gahart, et al., *Sexuality in the Workplace*, Basic and Applied Social Psychology, at 255-65 (1983). Supervisors are also more likely to subject employees to the more severe forms of harassment. J.N. Cleveland & M.E. Karst, *Sexual Harassment and Perceptions of Power: An Under-Articulated Relationship*, J. of Vocat. Behav. 42, at 54 (1993).

Both *quid pro quo* and hostile environment sexual harassment derive from the supervisor's abuse of authority. There is no reason to distinguish between abuse of authority to hire, fire and discipline employees (the classic *"quid pro quo"*) and abuse of authority to supervise the work environment and ensure a safe, productive workplace (the classic "hostile environment"). In both cases, it is the authority vested in the supervisor by the employer that enables him to commit the wrong. Individuals in higher-status positions within an organization believe and are believed to have the right to make demands of those in lower

status roles.[8] Some high-status individuals view harassing behavior as an extension of that right. Lower-status individuals are expected to comply. *See* J.N. Cleveland & M.E. Karst, at 54.

Not only do supervisors have, by definition, greater authority and power than do their targets, but they also influence the norms of the workplace. Typically, supervisors evaluate the performance of their subordinates, determine assignments and, often, decide on whether an individual retains his or her job. They also influence the "climate" of work: what behaviors are acceptable, what performance standards exist, and how communication occurs. *Id.*[9] As a

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[8] The authority wielded by a supervisor can be apparent, based on the belief of third parties (particularly subordinates) that the supervisor has the authority to act. Restatement (Second) of Agency § 8 cmt. a, § 7 cmt. b. (1957). In some circumstances, an employer ratifies such authority simply by retaining the supervisor in his position. *Id.* § 8 cmt. b. Abuses of apparent authority are attributable to the employer. *Meritor*, 477 U.S. at 77 (Marshall, J., concurring) ("[I]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.").

[9] *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring) ("A supervisor's responsibilities do not begin and end with the ability to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace."). The lower courts have correctly held that it is not necessary that an official possess "ultimate authority to hire or fire" to be classified as a supervisor. *See Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990); *see also Reinhold v. Commonwealth of Virginia*, ___ F.3d ___, 1998 WL 45247 at *15 (4th Cir. Feb. 6, 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992); *Lai v. Prudential Ins. Co.*, 1998 Cal.App. LEXIS 211 (March 17, 1998).

result, a victim of supervisory harassment is more likely to submit and less likely to complain than in cases of co-worker harassment.

Ellerth's experience is typical of women harassed by their supervisors. Slowik, Ellerth's supervisor's supervisor, had ultimate authority over her assignments and promotions. (J.A. 121-22, 144, 160). Slowik used his position to traumatize Ellerth over a long period of time. Between 1993 and 1994, Slowik subjected Ellerth to a barrage of sexual comments, lecherous looks, and repeated touchings. (J.A. 130-33, 136-43, 153-60). Although Ellerth complained to Slowik (J.A. 148), her co-workers (J.A. 133, 148) and, eventually, other supervisors (J.A 15-16), she obtained no relief. Ultimately, she was forced to resign rather than continue to endure the conduct. *Id.* Because Slowik's supervisory authority over Ellerth enabled him to harass her and get away with it, it makes no difference how his conduct is characterized. Petitioner should be held liable.

2. In light of the inherent connection between supervisory authority and sexual harassment, employers are liable under agency principles, which hold employers vicariously liable

for wrongs committed by agents under two circumstances relevant to this case. First, a supervisor's harassing conduct falls within the scope of his employment, bringing into play Section 219(1) of the Restatement (Second) of Agency, under which an employer is liable for torts committed "within the scope of employment" of an agent. While employers rarely if ever authorize their supervisors to commit sexual harassment, and may even expressly forbid such acts, that does not render the conduct outside the scope of the agency. The authority that must exist to hold the employer liable for the wrongs of an employee need not be the authority to commit the wrong itself. If that were the test, vicarious employer liability for employees' torts would be rare indeed.[10] An act may be "forbidden, or done in a forbidden manner," Restatement (Second) of Agency § 230, and it may even be "consciously criminal or tortious," *id.* § 231, yet still be within the scope of employment.

The Alaska Supreme Court's ruling in *Doe v. Samaritan Counseling Center*, 791 P.2d 344, 348 (Ak. 1990), illustrates this principle. There, the defendant counseling center was held liable for the acts of an employee who engaged in a

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[10] If employers authorize or negligently respond to wrongful acts, there is no need for vicarious liability; they are directly liable for their own intent or negligence. Under petitioner's view of "scope of employment," vicarious liability would exist only when the employer was already liable, rendering the concept entirely duplicative and a virtual dead letter. *See* 29 C.F.R. § 1604.11(b) (EEOC 1980 Guidelines recognizing irrelevance of fault where employer is vicariously liable).

sexual relationship with a patient which was clearly not within his job description. Nevertheless, under the scope of employment doctrine, the employer was liable because "the tortious conduct ar[ose] out of and [was] reasonably incidental to the employee's legitimate work environment."[11] In short, the proper question to ask is whether the employer placed the supervisor in a position to commit the act in the course of performing his regular responsibilities.[12] As the Restatement of Agency points out:

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[11] *See also Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (government liable for unauthorized acts of counselor who engaged in sexual relationship with patient in conjunction with acts within scope of duties); *Agarwal v. Johnson*, 603 P.2d 58 (Cal. 1979) (employer liable for willful torts of its supervisors, including intentional infliction of emotional distress and defamation, committed in scope of employment); *Turner v. State*, 494 So.2d 1292 (La.Ct.App. 1986) (state liable for sexual batteries, trespass, and invasion of privacy by national guard recruiting officer against female recruits).

[12] *Doe* illustrates the fallacy in Professor Verkerke's distinction (relied upon by petitioner, Pet.Br. 23 n.16) between *quid pro quo* harassment and so-called "attempted" *quid pro quo* harassment, on the ground that the former involves "unconcealed" acts "about which the employer can learn even more easily than victims." J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 Va. L. Rev. 273, 367 (1995). An agent's torts are often "concealed" for the very reason that they constitute abuses of delegated authority. An employer is nevertheless liable for them. By stressing "concealment" rather than the authority of the agent, this argument departs from *Meritor's* directive to apply agency law.

> [t]he fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment. If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability . . . .

Restatement (Second) of Agency § 236 cmt. b.

Petitioner's liability for the conduct of its supervisors is also proper under Section 219(2)(d) of the Restatement (Second) of Agency, which provides that an employer is liable for the acts of an employee when he "was aided in accomplishing the tort by the existence of the agency relation." A supervisor's authority may enable him to assign work, require attendance at particular sites and times, and influence whether and under what conditions the employee works. When subordinate employees are sexually harassed, such authority almost always facilitates its occurrence and success. *See* EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual at 405:6699 (citing § 219(2)(d)).

Application of these agency law doctrines should not vary with the type of harassment involved. As Justice Marshall noted in his concurring opinion in *Meritor*, there is no justification for having different standards of employer liability, at least when the harasser is a supervisor. *Meritor*, 477 U.S. at 77 ("No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.") (Marshall, J., concurring). As Judge Flaum noted in his opinion below, employer liability stems from the delegation of authority to a supervisor, which can be used as

"leverage over a supervisee that does not vary with the nature of the harassment." Pet.App. 13a n.4. The EEOC's 1980 Guidelines made much the same point, stating: "an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment," without distinguishing between different types of harassment. 29 C.F.R. § 1604.11(c) (1995).[13]

Agency law holds employers liable for the acts of agents to serve the twin purposes of compensation and deterrence, both of which are of paramount importance under Title VII. As Judge Swygert explained over a decade ago, "sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and

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[13] The standard we have outlined here is consistent with *Meritor*. Consistent with the Court's observation, 477 U.S. at 72, that Congress intended "to place some limits on the acts of employees for which employers under Title VII are to be held responsible," we urge that co-worker harassment should not give rise to strict liability. Nor does our test contravene the Court's holding that the court of appeals in *Meritor* "erred in concluding that employers are automatically liable for sexual harassment by their supervisors." *Id.* Employer liability is not automatic. Imposition of vicarious liability depends on the link between the harassment and the supervisor's authority. Although the link will almost always exist, the employer can show in a particular case that authority played no role in producing, motivating or facilitating the harassment.

retention of sexist supervisors." *Horn*, 755 F.2d at 605.[14]

A rule of vicarious liability encourages an employer, as no other regime does, to exercise the greatest care in screening prospective managers, and in training, supervising, and monitoring existing supervisors. As Judge Posner has explained: "[t]he most efficient method of discouraging sexual harassment may be creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable." Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311, 1332 (1989).[15]

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[14] Employer liability is further justified because virtually every court of appeals has held that individual agents cannot be held liable for their violations of Title VII. The lower courts have read § 701(b) of the statute -- which defines "employer" to include "a person engaged in an industry affecting commerce . . . and any agent of such a person," 42 U.S.C. § 2000e(b) -- not to hold the agent liable as a statutory "employer," but instead "to incorporate respondeat superior liability into the statute." *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *see also Gary v. Long*, 59 F.3d 1391, 1398-99 (D.C. Cir. 1995) (despite alleging facts sufficient to constitute a pervasive hostile environment, plaintiff left with no remedy, where employer was not liable because of "adequate" sexual harassment policy and harasser was held not to be covered employer). This Court has not reached the question whether an individual responsible for discrimination may be held liable as an "agent," and hence as an "employer," under the language of § 701(b).

[15] In his opinion below, Judge Posner limited this reasoning to instances where the threat is carried out, on the ground that

Unfortunately, some courts have departed from this standard in the area of hostile environment harassment, producing a dizzying array of alternative, and often inconsistent, theories of employer liability for supervisory sexual harassment. *See* Oppenheimer, 81 Cornell L. Rev. at 131. The Second and Tenth Circuits, however, have recently set forth helpful applications of agency principles. In *Torres*, 116 F.3d at 635, the Second Circuit noted that "to establish liability on the theory that the supervisor exploited the

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where the threat is not carried out, the supervisor "has not used his delegated authority to commit a company act, [so] there is no way in which a system for vetting such acts would catch him out". Pet.App. 50a-51a (Posner, J., concurring in part and dissenting in part). Judge Posner was wrong on both counts. In making the threat, the supervisor has used authority the employer vested in him. Because it affects the conditions under which the victim works thereafter, it constitutes a company act. As for the employer's purported lack of means to deal with unfulfilled threats, Judge Posner ignored the importance of effective pre-threat procedures, as well as proactive monitoring of the workplace. While these steps cannot reduce incidents of *quid pro quo* threats to zero, that is no basis for ignoring the deterrent effect they do have, or to forego vicarious liability as an incentive for employers to use them. Any perceived unfairness in holding employers liable for unfulfilled threats is outweighed by the unfairness of leaving the victims of those threats without a remedy for the harm done to them. The employer who assumes the risks of doing business is better able than the victim to absorb the losses, insure against them, or distribute them. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 471 (3d ed. 1964).

agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." This nexus will exist in most cases of sexual harassment by supervisors. Rarely would a supervisor not be aided in his ability to subject a subordinate employee to harassment by his authority to control crucial aspects of her work environment. The Tenth Circuit recognized this fact of workplace life in *Harrison*, 112 F.3d at 1445-46, holding that the employer is liable because it confers on the supervisor authority over the subordinate employees, which is then abused. In this concrete sense, the agency relationship aids and facilitates the supervisor in perpetrating the harassment.[16]

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[16] The case for applying these agency principles in sexual harassment cases is enhanced by their routine application to other types of discrimination. In typical Title VII hiring, discharge or promotion cases, the acts of supervisors are imputed to the employer, without regard to fault or notice on the employer's part. *See* page 10, *supra*. Petitioner seeks to distinguish such cases on the ground that other forms of discrimination constitute "company acts." Pet.Br. n.14. This claim founders in its assumption that a supervisor who uses the authority vested in him by the company to sexually harass subordinates does not commit a "company act," by which petitioner evidently means an act that causes a "tangible job detriment." *Id.* This Court has rejected the claim that harassment must cause tangible economic loss to constitute discrimination under Title VII. *Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 64. As a result, there is no reason to treat one form of discrimination (sexual harassment) differently from all others as not involving a "company act."

The standard articulated in *Harrison* and the 1980 EEOC Guidelines provide the bright line test that can dispel the confusion that has grown since *Meritor*. They condition employer liability not on some hybrid of direct and vicarious liability, but instead on a straightforward application of agency law: employers are liable (1) for the wrongful acts of employees committed within the scope of their employment, or (2) for acts that are facilitated by the agency relationship the employer has created. This Court should reaffirm *Meritor's* adoption of agency principles, and endorse the Guidelines' accurate and unadorned explanation of them.[17]

III. Imposing Liability on Employers For Supervisor Harassment Will Not Produce a Flood of Litigation

Finally, petitioner contends that imposing liability on employers for supervisory harassment will greatly expand the number of harassment lawsuits and decrease those that are resolved at the summary judgment stage. Pet.Br. 25. There is no basis for these assertions.

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[17] If an employer's liability for supervisory harassment does not depend either on the form the harassment takes or on the employer's negligence, it follows that the court of appeals erred in holding that Ellerth waived any reliance on a hostile environment theory by disavowing the argument that "liability should be imposed because of employer negligence." Pet.App. 28a (Flaum, J., concurring). Ellerth did not concede that she had not been subjected to a hostile environment; the court of appeals said only that in order to proceed on that theory she needed to base her argument on petitioner's negligence, which she had expressly declined to do.

As this Court observed in *Oncale*, 66 U.S.L.W. at 4173, the courts have imposed high legal standards and proof requirements to avoid the implication that they are improperly regulating conduct in the workplace. As the numerous cases where egregious facts existed and no liability was found demonstrate, these requirements constitute powerful obstacles for plaintiffs to overcome. *E.g., Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (telling co-workers that customers were "bitchy," "dumb," or suffering from PMS, commenting on size of female employee's breasts, ogling women co-workers, placing ad for nudist colony on plaintiff's desk, and telling plaintiff about erotic dreams he had about her not sufficiently "deeply offensive" to be sex harassment); *Baskerville v. Culligan Int'l Co.*, 50 F. 3d 428, 432 (7th Cir. 1995) (calling plaintiff "pretty girl" repeatedly, making grunting and "um um um" sounds when she wore leather skirt, commenting that office was not hot "until you walked in here," and alluding to his wife's absence from town and his loneliness while making gesture suggesting masturbation; not sufficiently "severe" conduct to be sexual harassment). The standards of proof are sufficiently high to stem any anticipated "flood" of cases.

Moreover, experience belies petitioner's warning of a litigation explosion. Both California and Illinois do not distinguish between the form of harassment in imposing liability on employers. Cal. Gov't Code § 12940 (h) (West 1992 & Supp. 1996); *Lai*, 1998 Cal.App. LEXIS 211; *Green Hills Country Club v. Illinois Human Rights Comm'n*, 162 Ill. App. 3d 216 (5th Dist. 1987) (employers "strictly liable"

in Illinois for both *quid pro quo* and hostile work environment sexual harassment by supervisory personnel). There is no evidence that either state has witnessed an explosion of cases and unlimited employer liability as a result.

In fact, lawsuits could even decrease were vicarious liability imposed for supervisor harassment. Employers would be given an incentive to put sexual harassment policies and training programs in place. 54% of Fortune 500 employers admitted that fears of legal exposure prompted them to establish company policies against sexual harassment. R. Sandroff, *Working Woman*, at 70. Prevention programs, including well-communicated policies and effective training programs, are the best means of reducing sexual harassment in the workplace. *See* J.I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J.L. & Pub. Policy, 57, 74 (Spr. 1994); *Panelists Say Education is Essential to Effective Harassment Prevention Policy*, 66 U.S.L.W. 2271 (Nov. 4, 1997). Companies implementing sexual harassment training programs have reduced the number of claims that develop into lawsuits. *See* Sarah Glazer, *Crackdown on Sexual Harassment*, 6 CQ Researcher 625, 633-34 (July 19, 1996) (of 456 mid-size and large companies, 8% of companies with training programs were sued, as opposed to 12% of those without such programs).

Petitioner's argument (Pet.Br. at 25) that imposing liability on employers for supervisor harassment will reduce the number of cases resolved through summary judgment is

similarly specious.[18] The credibility issues to which petitioner refers (Pet.Br. at 26) go to the elements of the underlying harassment: *e.g.*, whether the conduct was "sufficiently severe or pervasive." By contrast, the issues relating to employer liability (who committed the harassment, and whether he had sufficient authority) depend far less on potentially conflicting testimony. If anything, eliminating the distinction between *quid pro quo* and hostile environment harassment when determining employer liability will increase the number of cases decided as a matter of law.

CONCLUSION

The judgment below should be affirmed. Respectfully submitted,

Beth H. Parker
Rose Fua
Juhu Thukral
Equal Rights Advocates
1663 Mission St. Ste. 550
San Francisco, CA 94103
(415) 621-0672

Samuel A. Marcosson
Counsel of Record
Louis Brandeis School of Law
University of Louisville
Louisville, Ky. 40292
(502) 852-6369

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[18] The argument is also peculiarly results-oriented. Petitioner assumes that adoption of a legal standard for employer liability should be controlled by asking whether it would produce outcomes petitioner deems desirable early enough in the litigation. This argument has the matter backwards. Whether summary judgment should be granted is determined by the governing legal standard. The legal standard does not depend on whether it allows summary judgment to be granted in some pre-determined ideal percentage of cases.

APPENDIX

Equal Rights Advocates ("ERA") has dedicated itself for the past twenty-four years to achieving equality for women and girls. ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII of the Civil Rights Act of 1964, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA educates hundreds of women each year through its Advice & Counseling Line regarding their legal right to be free from sexual harassment, conducts sexual harassment workshops for schools and nonprofit organizations, and provides technical assistance to attorneys who are handling sexual harassment claims. ERA has appeared as amicus curiae in numerous California and federal sexual harassment cases including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 WL 792661 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, No. 97-282 (S. Ct.); and *Gebser v. Lago Vista*, No. 96-1866 (S. Ct.). In 1996, ERA authored an *amicus* brief in the California case, *Lai v. Prudential Insurance Co.*, 1998 Cal.App. LEXIS 211 (March 17, 1998), which examined the definition of "supervisor" for employer liability purposes under California's anti-discrimination statute.

The *NOW Legal Defense & Education Fund* ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of

that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Faragher v. City of Boca Raton*, No. 97-282 (S. Ct.); *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993); and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.2d 1486 (M.D. Fla. 1991). NOW LDEF filed an *amicus* brief in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has grown from a small group of volunteers into one of the nation's most powerful and effective advocates for women and families. Working with business, government, unions, nonprofit organizations, and the media, the National Partnership is a voice for fairness, a source for solutions, and a force for change.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects women from sexual harassment in employment.